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DR MOHAMAD AFZAL FARIKULLAH KHAN v. MALAYSIAN MEDICAL COUNCIL

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID J
[ORIGINATING SUMMONS NO: WA-24-82-07-2016]
10 AUGUST 2017

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PROFESSIONS: *Medical practitioner – Infamous conduct – Medical report containing untrue, misleading and improper statements – Whether there was failure to exercise scrupulous care in preparation of report – Whether there was a breach of Malaysian Medical Council's Code of Professional Conduct – Whether there was a demonstration of unprofessional behaviour – Medical Act 1971, ss. 29(2) & 30*

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PROFESSIONS: *Medical practitioner – Infamous conduct – Medical report containing untrue, misleading and improper statements – Failure to exercise scrupulous care in preparation of report – Medical practitioner found guilty under s. 30 of Medical Act 1971 by Malaysian Medical Council – Sentencing – Mitigating factors considered – Whether six month suspension from Malaysian Medical Register grossly unjust – Whether ought to be reduced to one month suspension*

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The complainant, one Mohd Syukor, went to see the plaintiff, a registered medical practitioner with a complaint of left scrotal swelling. A scrotal exploration was undertaken by the plaintiff. The complainant, however, complained that he was suffering from severe pain for several days after the procedure. According to the complainant, when he went to see the plaintiff, the plaintiff insisted that the operation was perfectly executed. The complainant then asked for his medical report to enable him to get a second opinion. The report dated 21 September 2010 prepared by the plaintiff stated that the patient (i) repeatedly refused discharge claiming that he was not comfortable and needed to stay to maximise his insurance; (ii) had been harassing and making advances to the nurses; and (iii) would benefit from counselling from a psychiatrist as he was apparently suffering from marital problems and that a diagnosis of Munchausen Syndrome was very likely. The complainant then lodged a complaint against the plaintiff to the defendant, the Malaysian Medical Council ('MMC'). After several days of inquiry, the defendant issued a charge of an infamous conduct against the plaintiff under s. 30 of the Medical Act 1971 ('MA 1971') stating, among others, that the plaintiff had signed and given untrue, misleading or improper report contrary to section 2.1.4 of the MMC's Code of Professional Conduct ('Code') and/or demonstrated unprofessional behaviour in the preparation of the said report and neglected or disregarded his professional responsibilities

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contrary to section 1.1 of the said Code. The defendant sentenced the plaintiff to a period of six months' suspension from the Malaysian Medical Register ('Register'). Dissatisfied, the plaintiff appealed against the said decision and submitted, *inter alia*, that (i) the statement in the report did not constitute an infamous conduct; and (ii) the report was issued based on the best information available to the plaintiff.

Held (dismissing plaintiff's appeal; varying order of punishment):

(1) Based on section 2.1.4 of the Code, for a finding of infamous conduct based on any statement made in a report, it must be found that the statement is either untrue, misleading or improper. The defendant had established that the report contained the statement that the complainant was suffering from marital problems, and a diagnosis of Munchausen Syndrome was very likely. The report was not a referral letter to be given to a particular specialist. Therefore, the plaintiff had failed to exercise scrupulous care in preparation of such a report. (para 45)

(2) It was clear from the inquiry and in the plaintiff's own affidavit that the plaintiff admitted that the choice of words used in the medical report may not have been the best. The plaintiff clearly did not adduce sufficient evidence to state why such irrelevant statement was included in the medical report. The plaintiff had clearly breached the Code when the plaintiff, a urologist, and not trained or exposed in the psychiatry field, had made a statement that the complainant was suffering from Munchausen Syndrome. Accordingly, the plaintiff could not make a diagnosis not within his field of specialty and should not have stated that the complainant had marital problems solely by relying on the complainant's statement to the plaintiff, which was 'who does not have a marital problem.' (paras 53 & 54)

(3) The record showed that the plaintiff had clearly admitted that such statement was not made in his professional opinion and the intention to alert the next physician was never demonstrated in his report. A finding of misconduct must necessarily be a mistake by the practitioner where there was carelessness or inadvertence with some element of moral turpitude or fraud or dishonesty or such persistent recklessness or disregard of his duty as a medical practitioner. It must be found by the defendant that such statements made in the report were untrue, misleading or improper. (paras 55 & 56)

(4) The defendant had carefully considered the oral and documentary evidence and made firm findings of facts based on the evidence presented before it. It could not be said that the defendant had reached a wrong decision simply because it had failed to mention the standard of proof in its finding. The defendant's decision on the finding of guilt

of the plaintiff was justified, taking into account the evidence as a whole. Thus, the defendant had arrived into the correct finding of guilt of the plaintiff on the charge of infamous conduct in a professional respect under s. 29(2) of the MA 1971 and punishable under s. 30 of the same. (paras 35, 60 & 61)

(5) The plaintiff was the sole breadwinner for the family and he was the only urologist in Penang (Mainland). The charge against the plaintiff was related to the contents of a medical report that was issued to the complainant, hence the choice of words could not be perfect. The plaintiff regretted that the contents of the report had been misconstrued and that there was no malice intended. In the circumstances, and after considering that this was the plaintiff's first case and he had given his assurance that he would exercise caution in preparing medical reports in the future and being remorseful, it did not warrant a suspension of six months from the Register. The sentence was thus reduced to a one-month suspension from the Register. (paras 65 & 67)

Case(s) referred to:
Chong Chen Foh v. Tan Lai Soon [2013] 2 CLJ 78 HC ***(refd)***
Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***
Dr Siti Aishah Abdullah v. Majlis Perubatan Malaysia [2010] 1 LNS 1788 HC ***(refd)***
Dudley Ernest Lynoln Wager Felix v. General Dental Council [1960] AC 704 ***(refd)***
Julius Libman v. General Medical Council [1972] AC 217 ***(refd)***
Keith Sellar v. Lee Kwang & Another Appeal [1980] 1 LNS 36 FC ***(refd)***
Low Cze Hong v. Singapore Medical Council [2008] 3 SLR 612 ***(refd)***
Marzaini Zainuddin v. Majlis Peguam Malaysia [2007] 10 CLJ 339 HC ***(refd)***
Mohan Rajadurai v. Majlis Perubatan Malaysia [1998] 1 CLJ 903 HC ***(refd)***
Re Joseph Francis Lopez [1976] 1 LNS 131 HC ***(refd)***
Wong Kok Chin v. Singapore Society of Accountants [1989] 1 LNS 138 HC ***(refd)***

Legislation referred to:
Medical Act 1971, ss. 3, 29(2)(b), 30(ii), 31(1), (2)
Medical Regulations 1974, s. 31(6)

For the appellant - Robert Lazar & Aarthi Jeyaraj; M/s Shearn Delamore & Co
For the respondent - Harjinder Kaur & Gowri Chandran; M/s Revathi & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Kamaludin Md Said J:

Introduction

[1] The plaintiff is a registered medical practitioner under the Medical Act 1971 ("MA 1971"). The defendant, the Malaysian Medical Council ("MMC), is a statutory corporate body established under s. 3 of the Medical Act 1971 ("MA 1971") to perform the duties and functions and exercise the powers provided under the Medical Act.

[2] The defendant by way of the MMC order dated 21 June 2016 has found the plaintiff guilty of infamous conduct under s. 30 of the MA 1971 and sentenced the plaintiff to a period of six months' suspension from the Malaysian Medical Register.

[3] Being dissatisfied with the decision, the plaintiff brought this appeal under s. 31 of the MA 1971 by way of originating summons dated 20 July 2016 and sought the following reliefs:

a) The order granted on 21 June 2016 by the defendant against plaintiff pursuant to s. 30 of the Medical Act 1971 whereby the plaintiff was found guilty of infamous conduct and therefore suspended for six months from the Malaysia Medical Register, be set aside/reversed;

b) Alternative the order being altered;

c) Costs and other reliefs that the court thinks fit.

Grounds Of Appeal

[4] The appeal is premised on the following grounds, *inter alia* that:

(a) The defendant was erroneous in fact and law in its finding of guilt of the presented charge when the burden of proof should be of high standard and that the defendant had failed to prove the case against the plaintiff;

(b) The defendant had failed to consider the plaintiff's defence and that the testimony by the complainant was not supported by any evidence tendered during the investigation;

(c) The defendant had failed to appreciate that the medical report dated 21 September 2010 issued by the complainant was based on the clinical and pre-clinical information readily available to the plaintiff when the treatment was conducted;

(d) The defendant did not take into account that in the medical report by the plaintiff, the complainant was diagnosed with Munchausen Syndrome which would require further examination and evaluation, and this had been explained by the plaintiff in the investigation.

The Defendant Opposed The Appeal

[5] The defendant opposed the plaintiff's appeal and contending that the appeal is without merits. The defendant's case is that the plaintiff was found guilty of infamous conduct including irrelevant and/or improper statement in his medical report on the complainant's condition for which the plaintiff has signed untrue, misleading or improper report contrary to section 2.1.4 of the defendant's Code of Professional Conduct. The defendant is comprising of doctors, specialist, professors etc, who questioned the plaintiff during the inquiry in-depth detailed and very medical in nature.

[6] The defendant's Council members are the most appropriate persons to assess the plaintiff in this regard. The defendant's decision was justified taking into account the evidence as a whole and the punishment is a six months of suspension for the plaintiff's infamous misconduct. In addition to that with the vast collectible medical expertise between the members of the defendant at the inquiry, those are the correct person to assess and punish the plaintiff.

[7] The defendant prays that the plaintiff's appeal be dismissed with costs.

Facts Of Case

[8] There was a complaint lodged against the plaintiff by one Mohd Syukor bin Azizan.

[9] Mohd Syukor saw the plaintiff in the hospital on 9 August 2010 with a complaint of left scrotal swelling. The plaintiff made a provisional of spermatocele with a different diagnosis of scrotal lipoma and gave him a choice between conservative treatment and a surgical procedure but recommended the latter to which the complainant agreed on after consulting his wife.

[10] On 10 August 2010, a scrotal exploration was undertaken by the plaintiff and on the next day the plaintiff saw him and recommended his discharge. The complainant refused to discharge as he was still in pain.

[11] On 12 August 2010 the plaintiff referred the complainant to one Dr Yaakob as he complained a pain on his left leg.

[12] On 14 August 2010 the complainant was discharged and returned for physiotherapy on 18 August 2010 whereby he accidentally saw the plaintiff and informed that he was still in pain. The plaintiff was in denial saying that it was not true.

[13] The following days, the pain was severe that the complainant could not sleep and his wife informed the plaintiff of this condition but the plaintiff was still in denial.

[14] On 20 August 2010 the complainant came to see the plaintiff to which the plaintiff was still in denial (saying that the operation was perfect), the plaintiff referred the complainant to one Dr Anuar who then admitted the complainant to hospital on 23 August 2010 to an infection at the site of surgery.

[15] The complainant complained to the hospital thereby the meeting was held on 2 September 2010 attended by the plaintiff and other officers of the hospital. The complainant asked for his medical report to enable him to get a second opinion. The report was ready in a week's time.

[16] The report dated 21 September 2010 prepared by the plaintiff stated that:

(a) The patient repeatedly refused discharged claiming that he hasn't comfortable and need to stay to maximize his insurance claim. This was confessed by the complainant on 14.8.2010 after he was discharged.

(b) I also feel uncomfortable to continue managing him since he has been harassing and making advances to my clinic nurse. Furthermore, since he has officially complained to the hospital management about his dissatisfaction over the treatment while under my care, it is best he seeks his treatment elsewhere.

(c) I also believe that he would benefit from counselling from a psychiatric. Apparently, he is suffering from marital problem, and a diagnosis of Munchausen Syndrome is very likely.

[17] On 28 December 2010, the complainant saw Dr Zuraida Ahmad a psychiatric at mental health department of Bukit Mertajam Hospital. The report issued on 16 February 2011 by Dr Zuraida showed that the complainant did not have a serious mental illness and did not exhibit symptoms of Munchausen Syndrome.

[18] The complainant then lodged a complaint on the issues of:

(a) The plaintiff did not take his complaint on post-surgical issues seriously and asked the complainant to seek treatment elsewhere;

(b) That the plaintiff wrote in his report on 21 September 2010 that the complainant had refused to be discharged because he wanted to maximise his insurance claim; and further stated Munchausen Syndrome in the report therefore the insurance company refused to cover the costs;

(c) That the plaintiff alleged the complainant had harassed his nurse.

[19] On 21 December 2015 after the five days inquiry by the preliminary investigation committee (PIC) the defendant issued a charge of an infamous conduct against the plaintiff stating among others that the plaintiff had on 21 September 2010 signed and given untrue, misleading or improper report contrary to section 2.1.4 of the Malaysian Medical Council's (MMC) Code of Professional Conduct and/or demonstrated unprofessional behavior in the preparation of the said report neglected/disregarded his professional responsibilities contrary to section 1.1 of the said Code.

[20] On 9 May 2016, the plaintiff was notified of the findings by the defendant:

A (a) The report was not a referral letter to be given to a particular specialist;

(b) The content of the report has various statements which are unsubstantiated, misleading and/or improper eg, marital problem and Munchausen Syndrome;

B (c) Failed to exercise scrupulous care in the preparation of such a report.

[21] The plaintiff engaged a lawyer and submitted his mitigation on 21 June 2016 to state that:

(a) He is the sole breadwinner for the family and he is the only urologist in Penang (Mainland) and this is the plaintiff's first case since his C housemanship in 1995;

(b) The charge against the plaintiff is related to the contents of a medical report that was issued to the complainant hence the choice of words could not perfect;

D (c) The plaintiff was remorseful and regretted that the contents of the report had been misconstrued and that there is no malice intended.

[22] The defendant by way of the MMC order found the plaintiff guilty of infamous conduct under s. 30 of the MA 1971 and sentence the plaintiff to a period of six months' suspension from Malaysian Medical Register.

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Plaintiff's Submission

[23] The plaintiff grounded his appeal on the following grounds:

(a) There is a procedural impropriety as r. 31(6) of the Medical Regulations 1974 required the grounds to be given by the defendant in which case F the defendant had failed to do so despite making a finding of guilt.

(b) The statement in the report does not constitute an infamous conduct.

(c) The report was issued based on the best information available to the plaintiff.

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[24] In his written submission, the plaintiff submitted that the finding of the defendant in the letter dated 9 May 2016 is flawed for the following three reasons which can be summarised as follows.

First Ground – The Report Was Not A Referral Letter To Be Given To A Particular H *Specialist*

[25] The plaintiff contended that the Code of Conduct does not distinguish a referral letter from a report. The report dated 21 September 2010 was not addressed to anyone in particular, therefore it was not referral letter and it was deemed to be a "report". The report was not addressed to any specialist

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in particular as it was issued upon the request of the complainant wanted to be referred to for a second opinion. Therefore, this cannot be a ground to support the finding of infamous conduct against the plaintiff.

Second Ground – The Content Of The Report Has Various Statements Which Are Unsubstantiated, Misleading And/Or Improper eg, Marital Problem And Munchausen Syndrome

[26] The plaintiff submitted that in the report, the plaintiff had suggested that the complainant "would benefit from counselling from a psychiatrist". The plaintiff in support of this statement did not make a definite diagnosis in this regard, but stated that "apparently", he is suffering from a marital problem and a diagnosis of Munchausen Syndrome is very likely". The purpose of the statement in the medical report was for the complainant to be assessed by a psychiatrist and the plaintiff did not make any confirmed diagnosis of Munchausen Syndrome.

[27] The plaintiff's sole intention was to have the complainant reviewed and assessed further. However, the plaintiff admitted during inquiry, that the choice of words may not have been the best. The intention of the report was to alert the next treating physician that none of the previous clinicians could explain why the complainant had different type of pain, which is unusual in their combined clinical practice. Therefore, the defendant's finding is baseless and cannot substantiate a finding of guilt of infamous conduct against the plaintiff. The reason for stating that the complainant had marital problems was based on the fact that the complainant personally told the plaintiff "who doesn't have a marital problem".

[28] To the plaintiff, this issue is relevant to the psychiatrist to evaluate and assess the complainant. Therefore, the plaintiff saw it fits to include in the report. In his report, the plaintiff has used the word "apparently" to demonstrate this what he has been told by the complainant. The defendant seems to have misinterpreted the statement made by the plaintiff. As such, there was nothing improper, untrue or misleading about the statement.

Third Ground – Failed To Exercise Scrupulous Care In Preparation Of Such A Report

[29] Plaintiff submitted that the content of the medical report was based on clinical and para-clinical information that was available to the plaintiff. There was no malice in what the plaintiff had written and it was for the well-being of the complainant. If the plaintiff had such malicious intention as alleged by the complainant and/or defendant, the plaintiff would have complained to the insurance company or to the complainant's employer.

A **Defendant's Submission**

[30] On the other hand, the defendant submitted that the plaintiff had admitted that the choice of words used in the medical report may not have been the best.

B **[31]** The plaintiff had clearly breached the Code of Professional Conduct when the plaintiff as a urologist and not trained or exposed in psychiatry field had made statement that the complainant is suffering from Munchausen Syndrome. Accordingly, the plaintiff cannot make a diagnosis not within his field of specialty and should not have stated that the complainant has a marital problem.

C **[32]** The defendant further submitted that when it comes to a specific profession, a man should be assessed by its "own peers" and not the court by following the procedures.

[33] The plaintiff has neither called Ms Azni nor adduced any police report D or any formal complaint to the hospital management that is allegedly made by Ms Azni (plaintiff's nurse) at any material time in respect of the sexual harassment and which was also part of the plaintiff's defence during the inquiry.

Opinion Of This Court E

[34] This court heard the oral submissions from both the plaintiff and the defendant and also reading their written submissions with the authorities filed and cited therein and adjourned the decision on 10 August 2017.

[35] Having considered the plaintiff's appeal and perused the records in the F affidavits filed herein, this court was of the view that the defendant had arrived into the correct finding of guilt of the plaintiff on the charge of infamous conduct in a professional respect under s. 29(2) of the Medical Act 1971 and punishable under s. 30 of the same.

[36] It is not disputed that the charge against the plaintiff was for 'infamous G conduct' in a professional respect under s. 29(2) (b) of MA 1971 which reads as follows:

> (2) The Council may exercise disciplinary jurisdiction over any registered person who:
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> H …
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> (b) has been guilty of infamous conduct in any professional respect:

[37] Pursuant to the finding of guilt by the defendant, the MMC order to suspend the plaintiff for a period of six months pursuant to s. 30(ii) of the MA 1971 which reads as follows: I

The Council may, in the exercise of its disciplinary jurisdiction, impose any of the following punishments:

(i) order the name of such registered person to be struck off from the Register;

(ii) order the name of such registered person to be suspended from the Register for such period as it may think fit;

(iii) order the registered person to be reprimanded; or

(iv) make any such order as aforesaid but suspend the application thereof, subject to such conditions as the Council may think fit, for a period, or periods in the aggregate, not exceeding two years;

and may, in any case, make such order as the Council thinks fit with regard to the payment of the costs of the Registrar and of any complainant or of the registered person, and any costs awarded may be recovered as a civil debt.

[38] This court acts as an appellate court under s. 31 of the MA 1971 and it provides that any decision by the High Court shall be final.

[39] The crux of the appeal centered on the meaning of 'infamous conduct' in a professional respect under s. 29(2)(b) of MA 1971. The plaintiff argued that the statement "I also believe that he would benefit from counselling from a psychiatric. Apparently, he is suffering from marital problem, and a diagnosis of Munchausen Syndrome is very likely" in the report is nothing improper, untrue or misleading about it. It was submitted that the defendant, in this regard, has got it completely wrong. The word "apparent" was never meant and could not have meant that the plaintiff was "very sure" that the complainant had marital problems. The use of the word "apparent" taken in its literal context, was exactly the way the plaintiff had described it, that he had been told by the complainant that he had marital problems. As such, again, there was nothing improper, untrue or misleading about this statement. Most importantly, the defendant has failed to make a finding as to why this statement made by the plaintiff was unsubstantiated, untrue, improper or misleading. Therefore, it cannot be used as a ground to support a finding of infamous conduct against the plaintiff.

[40] Further, it was submitted that the defendant in finding the plaintiff guilty, was that he allegedly "failed to exercise scrupulous care in preparation of the medical report". There is nothing that was stated during the course of proceedings, nor when the decision by the defendant was made, to indicate the manner in which the defendant came to this finding. There were no reasons given to demonstrate how the plaintiff had allegedly failed to exercise scrupulous care in the report, given that the plaintiff has explained the basis of his report and the facts that he had relied on. There was nothing untrue, improper or misleading in the report to suggest that the plaintiff failed to exercise scrupulous care in preparing the report.

[41] In this regard, I must refer to Part II of the Code of Professional Conduct by the Malaysian Medical Council ('Code of Conduct') sets out the meaning of 'infamous conduct', as follows:

> The phrase "infamous conduct in a professional respect" was defined in 1894 by Lord Justice Lopez as follows:
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> If a medical man in the pursuit of this profession has done something with regard to it which will be reasonably regarded as disgraceful or dishonorable by his professional brethren of good repute and competency, then it is open to the General Medical Council, if that be shown, to say that he has been guilty of infamous conduct in a professional respect.
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> In another judgment delivered in 1930, Lord Justice Scrutton stated that:
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> "Infamous conduct in a professional respect means no more than serious misconduct judged according to the rules, written or unwritten, governing the profession."

[42] The Code of Conduct also sets out guidelines for a practitioner in relation to medical reports issued:

> **7. Medical Records and Reports**
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> Good medical records are an indication of good practice. The doctor is encouraged to record all relevant details of his management of a patient. Accurate, legible, comprehensive and contemporaneous notes are advised. Doctors have obligations relating to the storage, access and use of health information available in the patients' records.
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> The patient is entitled to a written report of the care that has been given to him. The doctor is obligated to provide him such a report speedily, without any unreasonable delay. The withholding of information of the care given to the patient is unethical.
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> The doctor can be held responsible for any breaches of confidentiality of medical records. Medical information can be released to a third party only when written consent has been given by or on behalf of the patient. Third parties who frequently seek information from a doctor are employers who request reports on the medical condition of absent or sick employees, insurance companies requiring particulars about the history of proposers for life assurance or deceased policyholders, medical boards and other agencies seeking medical information about individuals associated with it as well as solicitors to consider and assess claims. Fees may be charged for medical reports or opinions requested by third parties.
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> Where medical information is sought, the doctor should make it a rule to refuse to give any information in the absence of the written consent of the patient or the competent relative.

[43] In the present case, the charge of an infamous conduct against the plaintiff is stated among others that the plaintiff had on 21 September 2010 signed and given untrue, misleading or improper report contrary to section 2.1.4 of the Malaysian Medical Council's (MMC) Code of Professional Conduct and/or demonstrated unprofessional behaviour in the preparation of the said report neglected/disregarded his professional responsibilities contrary to section 1.1 of the said Code (Responsibility by Standard of Medical Care to Patients).

[44] The Code of Conduct deals with the obligations of medical practitioners when issuing reports or other documents of the same character of which section 2.1.4 provides as follows:

> **2.1.4 Certificates, Notifications, Reports, etc.**
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> Registered practitioners are in certain cases bound by law to give, or may from time to time be called upon or requested to give particulars, notifications, reports and other documents of a kindred character, signed by them in their professional capacity, for subsequent use either in the Courts or for administrative purposes.
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> Practitioners are expected by the Council to exercise the most scrupulous care in issuing such documents, especially in relation to any statement that a patient has been examined on a particular date. Any registered practitioner who shall be proved to the satisfaction of the Council to have signed or given under his name and authority any such certificate, notification, report or document of a kindred character, which is untrue, misleading or improper, will be liable to disciplinary punishment.

[45] Therefore, based on section 2.1.4, it is clear that for a finding of infamous conduct based on any statement made in a report, it must be found that the statement is either untrue, misleading or improper. The defendant had established that the report contains the statement that the complainant is suffering from marital problem, and a diagnosis of Munchausen Syndrome is very likely. It has been established also that the report was not a referral letter to be given to a particular specialist. Therefore, on the established facts, my view is that the defendant was not wrong in holding that the plaintiff had failed to exercise scrupulous care in preparation of such a report.

[46] The severity of a finding of infamous conduct can be gleaned from the definition of 'infamous conduct' as set out in the case of *Dudley Ernest Lynoln Wager Felix v. General Dental Council* [1960] AC 704 which states as follows:

> It must, of course, be remembered that in the present case the words "infamous or disgraceful conduct" should be construed in conjunction with the words "in a professional respect"; and we were referred in this connection to the well-known case of *Allinson v. General Council of Medical Education and Registration* where an injunction was sought by a medical practitioner against the defendant council from allowing his name to remain struck out from the medical register kept by the defendant council

under the Medical Act, 21 and 22 Vict. c. 90. By section 29 of that Act the name of any medical practitioner judged after due inquiry by the council "to have been guilty of infamous conduct in any professional respect" was liable to be erased from the register. The plaintiff's name having been so erased he brought his action for an injunction to the effect above mentioned, claiming that the proceedings leading to the erasure of his name were void on the ground (*inter alia*) that there was no evidence on which the council could reasonably find that the plaintiff had been guilty of "infamous conduct in any professional respect." This contention was rejected by Collins J. and the Court of Appeal, and Lord Esher said this: "I adopt the definition which my brother Lopes has drawn up of at any rate one kind of conduct amounting to 'infamous conduct in a professional respect,' *viz*.: 'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency,' then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.' The question is, not merely whether what a medical man has done would be an infamous thing for anyone else to do, but whether it is infamous for a medical man to do. An act done by a medical man may be 'infamous,' though the same act done by anyone else would not be infamous; but, on the other hand, an act which is not done 'in a professional respect' does not come within this section. There may be some acts which, although they would not be infamous in any other person, yet if they are done by a medical man in relation to his profession, that is, with regard either to his patients or to his professional brethren, may be fairly considered 'infamous conduct in a professional respect,' and such acts would, I think, come within section 29.

It should be noted that the conduct there in question was very different from the conduct with which the present case is concerned, and was on the face of it quite plainly of an infamous, or for that matter disgraceful, character; and the jurisdiction which the court was asked to exercise was the limited jurisdiction exercisable by way of control of the proceedings of a domestic tribunal, as distinct from the full appellate jurisdiction invoked in this case.

Granted that in accordance with Lord Esher's definition of "infamous" conduct in a professional respect the full derogatory force of the adjectives "infamous" and "disgraceful" in section 25 of the Act of 1957 must be qualified by the consideration that what is being judged is the conduct of a dentist in a professional respect, which falls to be judged in relation to the accepted ethical standards of his profession, it appears to their Lordships that these two adjectives nevertheless remain as terms denoting conduct deserving of the strongest reprobation, and indeed so heinous as to merit, when proved, the extreme professional penalty of striking-off.

> To make good a charge of "infamous or disgraceful conduct in a professional respect" in relation to such a matter as the keeping of the prescribed dental records it is not, in their Lordships' view, enough to show that some mistake has been made through carelessness or inadvertence in two or even three cases out of (to quote the figures in the present case) 424 patients treated during the period in which the mistakes occurred, whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done as she was told. To make such a charge good there must, in their Lordships' opinion, (generally speaking) be some element of moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty in regard to records as can be said to amount to dishonesty for this purpose. The question is to some extent one of degree, but in their Lordships' view the cases of overcharging with which this appeal is concerned clearly fall short of the degree of culpability required.

(See also the Malaysian and Singaporean cases which define and adopt this definition of 'infamous conduct': *Mohan Rajadurai v. Majlis Perubatan Malaysia* [1998] 1 CLJ 903 at 911 and *Low Cze Hong v. Singapore Medical Council* [2008] 3 SLR 612).

[47] I agree with the defendant that when it comes to a specific profession, a man should be assessed by its "own peers" and not the court by following the procedures.

[48] It has been held that at the end of the day, it is the Council and not the courts that have the professional expertise to determine whether the conduct of their peers fall within the contemplation of the words "infamous conduct in any professional respect" appearing in s. 29(2)(b) of the Act. The function of the Council is to adjudicate, not to prosecute, a complaint of "infamous conduct in any professional respect". In an appeal from the order made by the Council, the High Court can of course depart from the decision of the Council for cogent reasons. Section 31(2) of the Act makes it clear that the High Court shall be the court of final appeal." See the Federal Court in the case of *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445; [2012] 3 MLJ 173.

[49] Similarly, in *Keith Sellar v. Lee Kwang and Tennakoon v. Lee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191, the court further stated the following:

> We feel bound to reiterate here that the legal profession is an honourable profession whose members are expected to conduct themselves honourably. The appellants here were dealt with in a proceeding by virtue of a statute enacted to govern the conduct of members of their profession. Moreover, they were tried by their own peers. Members of the

A Disciplinary Committee were senior members of the profession who made firm findings of fact and they concluded that the appellants were guilty of misconduct in their practice as advocates and solicitors. The Chief Justice stated in *Au Kong Weng*'s case that statutes relating to the legal profession nor entrust the supervision of advocates and solicitors conduct to a committee of the profession, for it knows and appreciates better than B anyone else the standards which responsible legal opinion demands of its own profession.

[50] In *Marzaini Zainuddin v. Majlis Peguam Malaysia* [2007] 10 CLJ 339 it has also been decided that members of the same profession are in the best position to decide as they know and appreciate better than anyone else the C standards of conduct expected of the legal profession.

[51] The circumstances in which an appellate court can reverse a decision of a disciplinary committee has been set out in the case of *Julius Libman v. General Medical Council* [1972] AC 217 referred by the plaintiff, where it was held that it must be shown that either there was something clearly wrong D with:

(i) The conduct of the trial;

(ii) In the legal principles applied; and/or

E (iii) Unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence has been misread.

[52] This has been applied in the Malaysian cases of *Dr Siti Aishah Abdullah v. Majlis Perubatan Malaysia* [2010] 1 LNS 1788; [2011] 8 MLJ 845 at 852-F 853 and *Re Joseph Francis Lopez* [1976] 1 LNS 131; [1975] 1 MLJ 161 at 162.

[53] In this case, upon considering the record of the inquiry held by the defendant on the plaintiff, the defendant's finding that the plaintiff to be guilty against the charge *(supra)* is based on the evidence and defence during the inquiries before the defendant. It is clear from the inquiry and in the G plaintiff's own affidavit that the plaintiff admitted that the choice of words used in the medical report may not have been the best. The plaintiff clearly did not adduce sufficient evidence to state why such irrelevant statement was included in the medical report.

[54] In my considered opinion, the plaintiff had clearly breached the Code H of Professional Conduct when the plaintiff who is a urologist and not trained or exposed in psychiatry field had made a statement that the complainant is suffering from a Munchausen Syndrome. Accordingly, the plaintiff cannot make a diagnosis not within his field of specialty and should not have stated that the complainant has a marital problem solely by relying on the I complainant's statements to the plaintiff that "who doesn't have a marital problem".

[55] I cannot disagree with the defendant that the record shows that the plaintiff had clearly admitted that such statement was not made in his professional opinion and the intention to alert the next physician was never demonstrated in his report. The plaintiff had clearly breached his Code of Conduct as a medical practitioner and the said medical report was never intended to alert the next physician as it was not addressed to specific physician to treat the said complainant and that the inclusion of the same in the report would enable the clinician to receive the best information available.

[56] As such, it is clear that a finding of misconduct must necessarily be a mistake by the practitioner where there was carelessness or inadvertence with some element of moral turpitude or fraud or dishonesty or such persistent recklessness or disregard of his duty as a medical practitioner. This should be read together in the context of when a medical report is issued, it must be found by the defendant that such statements made in the report are untrue, misleading or improper.

[57] It is trite that the burden of proof in such serious allegation needs to have a high standard of proof, and not make a finding of guilt on a balance of probabilities. See the case of *Wong Kok Chin v. Singapore Society of Accountants* [1989] 1 LNS 138; [1990] 1 MLJ 456.

[58] Similarly, the required standard of proof to be applied in a disciplinary proceedings concerning advocate and solicitor must be of beyond reasonable doubt as was held in *Keith Sellar v. Lee Kwang* and *Tennakoon v. Kee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191 that:

> The second question is what burden of proof did the Disciplinary Committee apply in arriving at its findings. Looking at the grounds given in its statement of findings, the Disciplinary Committee although it made very firm findings unfortunately did not say expressly what standard of proof it adopted in arriving at its decision.
>
> First, what is the standard of proof required in such proceeding? Very recently, this court in *Au Kong Weng v. The Bar Committee, State of Pahang* dealt with the same question and accepted the standard set by *Bhandari*'s case. Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that anybody of professional men sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.
>
> The standard of proof required in a proceeding of this type is proof beyond reasonable doubt. In the judgment of this court in *Au Kong Weng*'s case, the Chief Justice said:

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> It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct. The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

B

[59] Further, in the case of *Chong Chen Foh v. Tan Lai Soon* [2013] 2 CLJ 78, the honourable judge followed the principle laid down in the case of *Keith Sellar v. Lee Kwang* and *Tennakoon v. Kee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191 and held as follows:

C

> The DC found the Appellant guilty of "gross improper conduct" in the said land transaction and for having acted against the interest of the Respondent. In view of the respondent's complaint to the DB, I agree with the submission of the appellant that the respondent's allegations concern deceit and moral turpitude and therefore the requisite standard of proof was beyond reasonable doubt … .

D

[60] In this case, I found that the defendant has carefully considered the oral and documentary evidence and made firm findings of facts based on the evidence presented before it. It cannot be said that the defendant has reached a wrong decision simply because it has failed to mention the standard of proof in its finding. In the case of *Keith Sellar v. Lee Kwang and Tennakoon v. Kee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191 referred above, it has also been held that the absence in the committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

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[61] In conclusion, the defendant's decision on the finding of guilt of the plaintiff was justified taking into account the evidence as a whole.

[62] The plaintiff in this appeal did include his alternative prayer that the sentence of a suspension of six months is grossly unjust and should be varied.

[63] In this regard, s. 31(1) of the Act provides that:

G

> Any person who is aggrieved by the decision by any order made in respect of him by the Council in the exercise of its disciplinary jurisdiction may appeal to the High Court, and the High Court may thereupon affirm, reverse or vary the order appealed against or may give such direction in the matter as it thinks proper …

H

[64] Section 30 gives the jurisdiction to the defendant to impose any of the punishment stated at para. (i) to (iv). In this case, the plaintiff was punished under para. (ii) of s. 30 that his name be suspended from the Register for six months. It is not disputed that the defendant chose to punish the plaintiff under s. 30 (ii) of the Act. The defendant can impose any period as it may think fit. The discretion is on the defendant, however, in my view, the

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punishment meted out should take into consideration the circumstances of offence committed and facts of the case. The sentence to be imposed must also take into account the mitigating factor.

[65] It was stated in the mitigation that the plaintiff is the sole breadwinner for the family and he is the only urologist in Penang (Mainland) and this is the plaintiff's first case since his housemanship in 1995. The charge against the plaintiff is related to the contents of a medical report that was issued to the complainant, hence the choice of words could not be perfect. The plaintiff was also remorseful and regretted that the contents of the report had been misconstrued and that there is no malice intended. The plaintiff also assures the Council that he will exercise caution in preparing medical reports in the future.

[66] In *Mohan Rajadurai v. Majlis Perubatan Malaysia* [1998] 1 CLJ 903, the plaintiff was found guilty for failure to keep proper medical records constitutes "infamous conduct" under s. 29(2)(b) of the Medical Act 1971 and the plaintiff was suspended for three months. Although in that case the court reversed the finding of guilt by the defendant on reason that any wrongful certification cannot be regarded as amounting to 'infamous or disgraceful conduct,' for purposes of comparing the sentence meted out by the defendant in that case for the same finding of guilt in this case, the suspension from the Register for six months, in my view is grossly unjust.

[67] It is not disputed that the plaintiff was found guilty of infamous conduct mainly because the report has various statements which are unsubstantiated, misleading and/or improper eg, marital problem and Munchausen Syndrome. My view is, in the circumstances of plaintiff's case and after considering that this is the plaintiff's first case and he has given his assurance that he will exercise caution in preparing medical reports in the future and being remorseful, it does not warrant a suspension of six months from the Register. The sentence is reduced to one-month suspension from the Register.

Decision Of This Court

[68] This court will not disturb the finding of guilt by the defendant on the plaintiff but vary the order of punishment by substituting the suspension for six months from the Register to one month.